IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.1544 OF 2005

P.Muthudass s/o Phicantya Das ...Applicant
vs.
Directorate of Revenue Intelligence
and another ...Respondents

Mr.S.B.Keshwani for the Applicant
Mr.R.F.Lambay for Respondent No.1
Ms M.H.Mhatre,A.P.P. for Respondent No.2-State

CORAM: A.S.OKA,J.
DATE : JULY 12,2005.

P.C.:

1. Heard Counsel appearing for the parties. The application is by original Accused No.2 who is facing prosecution under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act of 1985). The application was made by the Applicant and other two co-accused under Section 319 of the Code of Criminal Procedure, 1973. The prayer in the said application was that the learned Special Judge should proceed against the one Rajendra Gopichand Raridwatla as he also appears to be guilty of the offences under the said Act of 1985. The said Rajendra is P.W.No.9. The application was made at a stage when cross examination of the said witness by the Advocate for accused No.1 was in progress. The learned Special Judge rejected the said application.

2. The learned Counsel for the Applicant submitted that the

deposition of the said Rajendra clearly discloses that he was in possession of the objectionable substance. He submitted that Section 35 of the said Act of 1985 is very clear and therefore the burden was on the said Rajendra to explain. He also placed reliance on section 54 of the said Act of 1985. He submitted that as there is clear evidence on record to show that the P.W.No.9 Rajendra was in possession of drug/psychotropic substance, the court should have exercised power under Section 319 of the Code of Criminal Procedure, 1973 and should have proceeded against the said Rajendra. He submitted that the prosecution cannot be allowed to pick and choose while arraigning the persons as accused. He submitted that there was no explanation as to why the said witness was not made accused. He placed reliance on the observations made by the Apex Court reported in 2000 A.I.R. SCW page No.375 (Abdul Rashid Ibrahim Mansuri Vs. State of Gujrat), (2003)7 S.C.C. page No.465 (Madanlal and Another vs. State of H.P.), 2004 S.C.C. (Cri) page No.1905 (Union of India Vs. Munna and another).

3. I have considered the submissions. The learned Special Judge rejected the application firstly on the ground that Section 35 and 54 of the said Act of 1985 can be invoked against the accused and not against any other person who has been examined as a witness. Secondly, the learned Judge held that it is prerogative of the prosecuting agency to decide as to who should be the accused and who should be prosecution

witness.

4. There cannot be any dispute about the proposition that it is the prerogative of the prosecution to decide after examining the relevant material as to who should be made accused. On plain reading of Section 35 and 54 of the said Act, the learned Judge appears to be right when he observed that the said sections will apply against the accused and not against the witness.

5. Apart from aforesaid facts, the deposition of the prosecution witness said Rajendra shows that the bus was kept parked at a place and it was not locked. When he entered the bus, accused No.1 was sitting in the bus along with the drug/psychotropic substance. The decision relied upon by the learned Counsel for the Applicant will not help the case of the Applicant for more than one reason. Firstly, the said decisions are rendered in fact situation in the respective cases before the Apex Court and secondly the said decisions are in Special Leave Petitions arising out of challenge to the decision of the Court after trial.

6. No fault can be found with the impugned order. Application is rejected.

JUDGE